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No. 78-385

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY D. VOLPE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court is reported at 430 F.Supp. 931.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1978. A petition for rehearing was denied on August 7, 1978 (Pet. App. 3a-4a). The

petition for a writ of certiorari was filed on September 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the interception of oral communications at specified premises, law enforcement agents may lawfully enter those premises, without separate express judicial authorization, to install and repair the device used to make the interceptions.

2. Whether a district court is empowered by statute to authorize surreptitious entries necessary to effectuate an oral interception order.

3. Whether petitioners have standing to challenge the admissibility of evidence of intercepted communications on the ground that government agents made surreptitious entries into premises that were not named in the intercept order.

4. Whether the government's unintentional failure to disclose the existence of a previous state wiretap required suppression of intercepted communications.

5. Whether the government's application provided information sufficient to support an order authorizing the interception of oral communications.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners Volpe and O'Brien were convicted (Indictment Cr.

H-76-37) of engaging in an illegal gambling enterprise through a pattern of racketeering activity and the collection of unlawful debts, in violation of 18 U.S.C. 1962(c) (Count 1), conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2), conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Count 3), and conspiracy to commit that crime, in violation of 18 U.S.C. 371 (Count 4). Petitioners Volpe and DiBenedetto were convicted of conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894 (Count 5). Petitioner O'Brien was convicted of using extortionate means to collect an extension of credit (Count 6) and of a separate conspiracy to commit that offense (Count 7), both in violation of 18 U.S.C. 894.[1]

In addition, petitioners Volpe and Byrne were convicted, following their pleas of nolo contendere, of conspiracy to steal a truck carrying an interstate shipment of meat, in violation of 18 U.S.C. 371 (Indictment Cr. H-76-41). Petitioner Stephanou was convicted, following her plea of nolo contendere, on three counts of making false statements to a grand

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[1] On Indictment Cr. H-76-37, petitioner Volpe was sentenced to concurrent terms of three to ten years' imprisonment and a $20,000 fine on Counts 1 and 5 and concurrent terms of three years' imprisonment on Counts 2 through 4. Petitioner O'Brien was sentenced to concurrent terms of three to ten years' imprisonment and a $20,000 fine on Counts 1, 6 and 7, and concurrent terms of three years' imprisonment on Counts 2 through 4. Petitioner DiBenedetto was sentenced to 18 months' imprisonment and a $5,000 fine on Count 5.

jury, in violation of 18 U.S.C. 1623, with respect to petitioner Volpe's involvement in the sale or receipt of stolen goods (Indictment Cr. H-76-39). The remaining petitioners were convicted, upon their pleas of guilty, of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Indictment Cr. H-76-37, Count 3).[2] Each of the above pleas was entered with the understanding that the district court's ruling on the suppression motion (see pages 8-9, *infra*) could be challenged on appeal. The court of appeals affirmed (Pet. App. 1a-2a).

1. The evidence, which is not in dispute, showed that from June 1974 through early April 1976, petitioners Volpe and O'Brien, with the assistance of the

[2] On Indictment Cr. H-76-41, petitioners Volpe and Byrne were each sentenced to a term of one year's imprisonment, execution of which was suspended, and one year's probation. On Indictment Cr. H-76-39, petitioner Stephanou was sentenced to concurrent terms of two years' imprisonment, all but 30 days of which was suspended, two years' probation, and a $500 fine. The remaining petitioners were sentenced on Count 3 of Indictment Cr. H-76-37 as follows:

Name	Imprisonment	Execution Suspended	Probation	Fine
Dellaferra	18 months'	after 6 months	2 years'	$3,000
Boornazian	18 months'	after 4 months	2 years'	$2,500
Bovino	18 months'	after 90 days	2 years'	$2,500
Cecchini	18 months'	after 90 days	2 years'	$3,000
Speziale	18 months'	after 90 days	2 years'	$1,000
Lepito	18 months'	after 30 days	2 years'	$2,500
Poulin	18 months'	in entirety	2 years'	$ 500
Jacomini	18 months'	after 4 months	2 years'	$2,500
Morris	18 months'	in entirety	2 years'	$1,000

other petitioners charged in Indictment Cr. H-76-37, conducted a large-scale illegal gambling business out of a storefront office located at 103 New Britain Avenue in Hartford, Connecticut. As an adjunct to their gambling business, petitioners Volpe and O'Brien loaned money at usurious interest rates and collected repayments of these loans and of gambling debts through the use of threats of force and violence.

Much of the government's evidence was derived from oral and wire communications that were intercepted pursuant to orders entered by the district court on December 16, 1974, and January 16, 1975. As part of its proof in the trial of petitioners Volpe, O'Brien, and DiBenedetto, the government introduced recordings of intercepted wire and oral conversations, testimony of two individuals who were involved in petitioners' illegal activities and who came to the government's attention through the electronic surveillance, and testimony of several victims of petitioners' extortionate credit practices, who (with one exception) were discovered by means of the intercepted conversations.

The interception orders specifically identified the premises—103 New Britain Avenue—on which the oral and wire communications were to occur. Although the storefront office located at that address was held out to the public as the O'Brien-Sullivan Home Improvement Company, the known facts at the time the orders were issued established that the premises were not being used for legitimate business purposes but instead were "unquestionably a sham

and a 'criminal blind' designed and maintained solely for the conduct of criminal activities" (430 F.Supp. at 936).

2. The district court's opinion contains a schematic representation depicting the basement area of the building where FBI agents completed installation of the eavesdropping equipment (430 F.Supp. at 938). As the diagram shows, petitioners' storefront office at 103 New Britain Avenue was situated on the ground floor of an L-shaped structure located at the intersection of New Britain Avenue and Julius Street. The upper two stories contained residential apartments. Located on the ground floor, in addition to petitioners' office, was John's Deli, at 99 New Britain Avenue. The building's side entrance, at 11 Julius Street, led to a common basement area containing laundry facilities for use by the building's tenants (*id.* at 937). The basement had two wire-mesh enclosures, one underneath the storefront office and one underneath John's Deli. One telephone terminal box was located inside the enclosure underneath John's Deli and another telephone box was situated in the common area of the basement (*ibid.*).

After issuance of the first interception order, FBI agents, in the early morning of December 17, 1974, entered 103 New Britain Avenue with a pass-key to survey the premises. The agents re-entered the premises the following morning and installed a listening device (430 F.Supp. at 938-939). Wires from the device were run into the basement, where other agents (who had gained access to the basement by

using a skeleton key to the basement door that fronted on Julius Street) entered the wire-mesh enclosure underneath 103 New Britain Avenue, retrieved the microphone wires, and made connections for the oral and wire interceptions in the common area telephone box. The equipment, however, did not function (*id.* at 939).

On the evening of December 18, the agents re-entered the basement area to determine the source of the problem and observed that there were other telephone wires leading into another telephone box inside the wire-mesh enclosure underneath John's Deli at 99 New Britain Avenue (430 F.Supp. at 939). The following day the government reported its problem to the district court and proposed a nighttime entry into neighboring John's Deli in order to connect the wires to the telephone box underneath that store (*ibid.*). The court rejected this proposal, however, citing the possibility of an encounter between the agents and the proprietor of the business establishment (C.A. App. 248-250).[3]

The district court's concern was conveyed to the telephone company, which proposed sending a repairman to John's Deli during business hours and transferring the service to the other telephone box in the basement. On the afternoon of December 19, a government agent accompanied a telephone repairman into the delicatessen (430 F.Supp. at 939). The repairman stated that he was from the telephone com-

[3] "C.A. App." refers to the joint appendix in the court of appeals.

pany and that he wanted to work on the telephone equipment in the basement; the agent did not identify himself. After receiving permission to enter the basement, the agent and repairman connected several wires from the telephone box below the delicatessen to the box in the common basement area (*id.* at 939-940).

That night, the agents again entered the common basement area through the side door on Julius Street and made the final connections (430 F.Supp. at 940). The agents returned to the common basement on the night of December 20 to replace certain wires that had not been functioning. On December 30, they again returned to disconnect the equipment, both times using the Julius Street door (*ibid.*).

On January 16, 1975, the district court signed a new order authorizing the further interception of oral and wire communications from 103 New Britain Avenue (430 F.Supp. at 940). Unlike the original order, this order included a specific reference to the Julius Street address. That evening, an agent entered the basement and made the necessary reconnections. A final entry of the basement was made on January 29, 1975, for the purpose of retrieving the microphone and disconnecting the equipment (*ibid.*).

3. After indictment, petitioners moved to suppress evidence derived from the electronic surveillance. Following an evidentiary hearing, the district court denied the motion, finding that the interception "orders and their subsequent execution were reasonable and lawful" (430 F.Supp. at 935) and that, at

the time the initial order was granted, the court had been aware that it would be necessary for the agents covertly to enter and install a listening device within the premises (*id.* at 936, 942). Relying primarily on *United States* v. *Agrusa*, 541 F.2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977), *United States* v. *Dalia*, 426 F.Supp. 862 (D. N.J. 1977), aff'd, 575 F.2d 1344 (3d Cir. 1978), cert. granted, No. 77-1722 (Oct. 2, 1978), and *United States* v. *Altese*, No. 75-CR-341 (E.D. N.Y. Oct. 14, 1976), aff'd *sub nom. United States* v. *Scafidi*, 564 F.2d 633 (2d. Cir. 1977), cert. denied *sub nom. Vigorito* v. *United States*, 436 U.S. 903 (1978), the court concluded that its eavesdropping orders implicitly authorized the agents to enter the premises and install the necessary equipment to accomplish the interceptions (430 F.Supp. at 942-943).[4]

The court of appeals affirmed the denial of the suppression motion for the reasons set forth in the district court's opinion (Pet. App. 2a).

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[4] In addition, the district court held, *inter alia*, that petitioners lacked standing to challenge the covert entries into the basement areas of the building (430 F.Supp. at 945-946), that the government's failure to disclose a previous state wiretap involving petitioner O'Brien and the premises at 103 New Britain Avenue was an unintentional omission, and that the government had sought in good faith to comply with the provisions of 18 U.S.C. 2518(1)(e) (*id.* at 947-950). Finally, the court concluded that, since the target premises were "known to be using 'total telephone service,' in which incoming calls were being transferred and re-transferred to unknown receivers, oral interception appeared essential to the accomplishment of an effective surveillance" (*id.* at 947).

DISCUSSION

1. Petitioners contend (Pet. 28-30) that the district court's orders issued pursuant to 18 U.S.C. 2518, authorizing the interception of oral communications at 103 New Britain Avenue, did not impliedly include judicial approval for the government to enter those premises to install listening devices. Relying on *United States* v. *Finazzo*, No. 77-5186 (6th Cir. Aug. 28, 1978),[5] petitioners further contend (Pet. 30-31) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 does not empower a district judge to authorize government agents to make covert entries for the purpose of implementing an interception order.

On October 2, 1978, this Court granted certiorari in *Dalia* v. *United States*, No. 77-1722, to review the question whether, in executing a valid court order authorizing the interception of oral communications in the defendant's office, law enforcement agents may lawfully enter the office, without separate express judicial authorization, to install the device used to make the interceptions.[6] If the Court affirms the de-

[5] See also *United States* v. *Santora*, No. 76-3440 (9th Cir. Oct. 6, 1978). The Department of Justice is currently considering what further action to take in the *Santora* case, which differs from the instant case and from *Dalia* and *Finazzo* because the interception order expressly authorized the entry to place the equipment.

[6] We are sending petitioners copies of our briefs in opposition in *Dalia* and in *Vigorito* v. *United States*, cert. denied, 436 U.S. 903 (1978).

cision of the Third Circuit in *Dalia* and holds that the statute empowers district courts to authorize surreptitious entries to install electronic eavesdropping devices and that such authorization may be implied from an eavesdropping order (at least, as here and in *Dalia*, when the court is fully aware that a covert entry will be necessary to execute its order), it will dispose of petitioners' foregoing contentions. Accordingly, we suggest that the Court defer decision on the instant petition pending its decision in *Dalia*.

2. Petitioners' remaining contentions are without merit and do not warrant review by this Court.

a. Petitioners contend (Pet. 27-30) that, even assuming that the entries into 103 New Britain Avenue were properly authorized by the initial interception order (which specifically referred to that address) and were thus lawful, the covert entries into the basement through the door at 11 Julius Street and the entry by ruse through John's Deli (at 99 New Britain Avenue) were outside the scope of the interception order (which did not mention those addresses) and required suppression of the fruits of the interceptions. The district court correctly concluded (430 F.Supp. at 945), however, that "the [petitioners] lack the requisite standing, both under Title III and under the fourth amendment," to challenge the basement entries.

In enacting Title III, Congress did not intend to grant broader standing to challenge allegedly illegal governmental intrusions than is conferred by the law of search and seizure generally. See S. Rep. No. 1097,

90th Cong., 2d Sess. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 175-176 n.9 (1969); *United States* v. *Scully*, 546 F.2d 255, 268 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *United States* v. *Armocida*, 515 F.2d 29, 35 n.1 (3d Cir.), cert. denied, 423 U.S. 858 (1975); *United States* v. *Bynum*, 513 F.2d 533, 534-535 (2d Cir.), cert. denied, 423 U.S. 952 (1975). Thus, since "Fourth Amendment rights are personal rights which * * * may not be vicariously asserted" (*Alderman* v. *United States*, *supra*, 394 U.S. at 174), petitioners may not urge suppression on account of alleged misconduct that did not violate their rights. See *United States* v. *Fury*, 554 F.2d 522, 526 (2d Cir.), cert. denied, 433 U.S. 910 (1977); *United States* v. *Hinton*, 543 F.2d 1002, 1011-1012 n.13 (2d Cir.), cert. denied, 429 U.S. 980 (1976); *United States* v. *Ramsey*, 503 F.2d 524, 532 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972).

Here, the illegality petitioners allege relates not to the seizure of their conversations, which was judicially authorized in full conformity with statutory and constitutional requirements, but rather to the basement entries necessary to complete installation of the interception equipment. There is no evidence that any of the petitioners were physically present in the basement when the entries occurred. Moreover, as the district court observed (430 F.Supp. at 945):

> None of the [petitioners] * * * have [*sic*] asserted any inherent possessory rights under their lease in the basement area, or in 11 Julius Street, 101 New Britain Avenue or even the basement area underneath 103 New Britain Avenue. No covert entry was made into the caged-in storage area of 99 New Britain Avenue. Absent any showing of a proprietary or possessory interest in the premises entered, a defendant has no standing to object to the ultimate fruits of such an entry. Since no such interest has been asserted here, the Court concludes that none existed.

Hence, since the basement entries were not into an area in which petitioners had a reasonable expectation of privacy, petitioners lack standing to assert that the entries violated Title III or the Fourth Amendment. *Brown* v. *United States*, 411 U.S. 223, 229 (1973).

b. Petitioners argue (Pet. 25) that the government's unintentional failure to disclose the existence of a state wiretap conducted more than two years earlier violated 18 U.S.C. 2518(1)(e) and required suppression of the evidence derived from the interception orders. This argument was correctly rejected by the courts below.

The government's application for authorization to make the interceptions in this case incorporated by reference an affidavit by FBI Agent Dewey Santacroce that described previous applications for wire interceptions. The affidavit stated that in 1973, in the course of a previous federal wiretap, the government had intercepted petitioner O'Brien's conversations relating to an illegal gambling business (430

F.Supp. at 948). Evidence adduced at the suppression hearing showed that in September 1972 petitioner O'Brien and the premises at 103 New Britain Avenue had been the subject of a state wiretap. State officials testified, however, that no information concerning that wiretap had ever been given to the federal government (*ibid.*). Agent Santacroce also testified that, at the time he prepared his affidavit, he was unaware of the state wiretap, but he added that he would have referred to that wiretap if he had known of its existence (*id.* at 949). After reviewing the evidence, the district court concluded (*ibid.*):

> Agent Santacroce's testimony was open, truthful, and made with a good faith belief that the prior wire interceptions revealed in his affidavit were the only ones of which he was aware, relating to the named subjects or the location 103 New Britain Avenue. The Court finds that under all the circumstances there was no knowing or reckless misstatement made to the Court by him and that he had made a good faith compliance with the provisions of 18 U.S.C. § 2518(1)(e).

In light of this fact finding, the court properly determined not to exclude the evidence.

In *United States* v. *Donovan*, 429 U.S. 413, 432-433 n.22 (1977), this Court stated that the provisions of Title III, rather than the judicially fashioned exclusionary rule, govern in determining whether evidence should be suppressed for statutory, as opposed to constitutional, violations. Here, as in *Donovan*, suppression is appropriate only if there has been a " 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' " *Id.* at 433-434, quoting from *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). Under Title III,

> the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity; (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. §§ 2518(3)(a-d). That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities.

United States v. *Donovan, supra*, 429 U.S. at 435.

The Court in *Donovan* concluded that "the failure to comply fully" with the identification requirement of Section 2518(1)(b)(iv) and the notice requirement of Section 2518(8)(d) did not "render[] unlawful an intercept order that in all other respects satisfies the statutory requirements." *Id.* at 434. In this case as well, the failure to disclose the 1972 state wiretap did not detract from the government's compliance with all of the essential statutory prerequisites

that are central to the authorization process. See *United States* v. *Chavez*, 416 U.S. 562, 578 (1974); *United States* v. *Abramson*, 553 F.2d 1164, 1169-1170 (8th Cir.), cert. denied, 433 U.S. 911 (1977).

Moreover, this is not a case in which the government agents "knowingly failed" to inform the issuing judge of the earlier state wiretap "for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking." *United States* v. *Donovan*, *supra*, 429 U.S. at 436 n.23.[7] Nor is this a case where an affidavit has been deliberately falsified or where statements in the affidavit manifest a reckless disregard for the truth. Cf. *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), slip op. 17. Absent any allegation that the omission was intentional or reckless, or at the very least that inclusion of the omitted information would have been material to the issuance of the interception order, there is no basis for ordering suppression of the evidence derived from the interceptions because of a violation of Section 2518 (1)(e). See, *e.g.*, *United States* v. *Scafidi*, 564 F.2d 633, 642 (2d Cir. 1977), cert. denied *sub nom.* *Vigorito* v. *United States*, 436 U.S. 903 (1978);

[7] Indeed, the district court observed (430 F.Supp. at 950) that the information concerning the state wiretap that was omitted from the government's application "would not have affected the Court's decision to grant the wire and oral intercepts. If anything, it would in all probability have provided supplemental reasons for granting the Court's ultimate action."

United States v. *Anderson*, 542 F.2d 428, 433 (7th Cir. 1976).[8]

c. Finally, petitioners contend (Pet. 26) that Title III does not authorize a joint application for both oral and wire interceptions unless both procedures are shown to be necessary and that the government in this case failed to present specific information establishing the need for interception of oral, in addition to wire, communications. Although we doubt that petitioners' construction of Title III is correct (see, *e.g.*, *Application of United States*, 563 F.2d 637, 644-645 (4th Cir. 1977)), the short answer to their claim is that the district court expressly found that the government did provide such additional information supporting the interception of oral communications (430 F.Supp. at 936):

> A significant factor in this Court's authorization of oral interceptions by installing a "bug-microphone" within the premises was the verified information that "total telephone service," a new and devious adjunct to criminal operations, was in use at the 103 New Britain Avenue premises. Through the use of "total telephone service," a telephone call received at that address could be automatically switched to another telephone or

[8] The cases on which petitioners rely (Pet. 25) are not in point. *United States* v. *Bellosi*, 501 F.2d 833 (D.C. Cir. 1974), involved a knowing and intentional decision by police not to disclose a prior wiretap. *United States* v. *Bernstein*, 509 F.2d 996 (4th Cir. 1975), was vacated by this Court for reconsideration in light of *Donovan* (430 U.S. 902), and the court of appeals reversed the suppression order on remand (556 F.2d 244 (4th Cir. 1977)).

telephones, by simply pushing a transfer button, and the call could subsequently be switched to still another number (In-chambers Tr., Dec. 16, 1974, at 22), thus making it impossible to intercept and monitor the call, or to trace it to its ultimate receiver. This circumstance indicated that a telephone wire intercept alone would be likely to prove fruitless.

The court therefore concluded that "oral interception appeared essential to the accomplishment of an effective surveillance" (430 F.Supp. at 947). Petitioners offer no basis for questioning that conclusion or the court's underlying factual finding.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's decision in *Dalia* v. *United States*, *supra*.

Respectfully submitted.

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